Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1201

In the Matter of the Application of

NEW YORK DOCK RAILWAY,

Appellant,

to Review the Determination of the DIRECTOR OF FINANCE OF THE CITY OF NEW YORK,

Appellee,

with respect to an alleged Utility Tax Deficiency.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1976

No.

NEW YORK DOCK RAILWAY,

Appellant,

v.

DIRECTOR OF FINANCE OF THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT

(a) Opinion Below

The Court of Appeals of New York wrote no opinion. It affirmed the memorandum opinion of the Appellate Division of the Supreme Court for the First Judicial Department, reported at 50 A.D.2d 540, and 375 N.Y. Supp.2d 328. The memorandum decision of the Court of Appeals has not yet been reported. Attached are copies of the memoranda of both courts.

(b) Jurisdiction

(i) This proceeding was instituted in February 1975 in the Supreme Court of the State of New York, for the County of New York, pursuant to Article 78 of the Civil Practice Law and Rules of that state, to review a utility tax imposed in October 1974 by the City of New York for the years 1969 and 1970.

(ii) The judgment sought to be reviewed was entered by the Court of Appeals of New York on December 22, 1976. There was no application for rehearing. The notice of appeal was filed on January 24, 1977 in the office of the Clerk of the County of New York, which is possessed of the record.

(iii) This Court has jurisdiction under 28 U.S.C. 1257(2) because the appeal questions the constitutionality of an ordinance enacted by the City of New York on the ground that, as here applied, it conflicts with the Commerce Clause of the United States Constitution.

(iv) Cases sustaining jurisdiction are:
Lovell v. *City of Griffith,* 303 U.S. 444;
Jamison v. *Texas,* 318 U.S. 413;
Breard v. *Alexandria,* 341 U.S. 622.

(v) The ordinance involved is New York City's Utility Tax, Title QQ, Section 46-2.0, of the Administrative Code of the City of New York. So far as here relevant, it reads as follows:

> "§ QQ46-2.0 Imposition of excise tax.—a. Notwithstanding any other provisions of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city, on or after August first, nineteen hundred sixty-five, every utility shall pay to the director of finance an exercise (sic) tax * * * that as to persons engaged in the business of operating or leasing sleeping and parlor railroad cars or of operating railroads other than street surface, rapid transit, subway and elevated railroads, the rate shall be three per centum until and including December thirty-first, nineteen hundred sixty-five, and three and fifty-two one hundredths per centum thereafter * * *."

A copy of the judgment of the New York Court of Appeals and of the notice of appeal are appended.

(c) Question Presented

Does New York City's Utility Tax violate the Commerce Clause of the United States Constitution insofar as it taxes the gross receipts from the continuous transportation of merchandise within the limits of the City of New York, which transportation originated in Canada and states other than New York.

(d) Statement of the Case

Mr. Thomas McLaughlin, controller of appellant for many years and familiar with the matters involved, testified that the challenged item involved interchanges between the New Haven Railroad and appellant. Merchandise from Canada and states other than New York was transported over the New Haven lines of the then New York Central, later Penn Central, to its railhead in the Greenpoint section of Brooklyn, New York City. There the railroad cars containing the merchandise were placed by appellant onto the railroad tracks on its carfloats and taken by water to its railhead at the Atlantic Avenue terminal in Brooklyn (A. 16). The cars were then put on appellant's railroad tracks on land and moved to the appropriate railroad sidings of the consignees (A. 17). For this service appellant received part of the through freight rate as established in tariffs filed with the Interstate Commerce Commission (A. 16, 18-20). It is these receipts that have been included in the gross receipts the City claims the right to tax. Despite the characterization in the notice (A. 8), it is con-

ceded that this did not involve any "lighterage" but rather continuous transportation of railroad cars engaged in interstate commerce (A. 11, 20).

In the petition seeking judicial review of the determination by the taxing authority, appellant alleged that it had protested the inclusion of the item here involved (together with another item which is no longer in the case) as beyond the constitutional power of the City to tax because the receipts were from operations in interstate and foreign commerce (Petition, par. 4, A. 4). The petition further alleges that the receipts here in question were such that to tax them would burden interstate commerce in violation of the United States Constitution (par. 6, A. 4). The point was expressly passed on by the Appellate Division, 50 A.D.2d 540 (A. 26), where it was said:

"Determination of respondent Director of Finance of the City of New York, dated October 30, 1974, taxing petitioner's receipts for transportation services ("lighterage") and for loading and unloading ships ("stevedoring") unanimously modified, on the law, to the extent of annulling the tax imposed on the stevedoring operations and otherwise confirmed, without costs or disbursements. It appears, and respondent now concedes, that petitioner's stevedoring activities involved imports and exports and that taxation of receipts from those operations is beyond the power of the city. (*Joseph* v. *Carter & Weekes,* 330 US 422.) However, we find no such immunity from the city's utility tax (Administrative Code of City of New York, § QQ46-2.0) for petitioner's receipts from rail and water transportation services rendered entirely within the city. (Cf. *Canton R.R. Co.* v. *Rogan,* 340 US 511; *Greyhound Lines*

v. *Mealey,* 334 US 653 and, on remand, *Central Greyhound Lines* v. *Mealey,* 298 NY 876; *Standard Steel Co.* v. *Washington Revenue Dept.* 419 US 560.)"

(e) The Question Presented is Substantial

This case presents to this Court the question of the applicability of *Canton R. Co.* v. *Rogan,* 340 U.S. 511, on which the taxing authority and the state courts relied (A. 9, 26), to a situation where all the activity taxed constituted part of foreign and interstate commerce, as well as the continued vitality of this Court's stevedoring cases, *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U.S. 90, and *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U.S. 422, relied on by appellant in the state courts and applied by the Appellate Division in rejecting the City's tax on the stevedoring operations conducted by appellant on the ground that these constituted foreign commerce (A. 26), but not discussed by that Court in holding the freight operations taxable.

The suggestion implicit in this decision that the stevedoring cases rest on the Import-Export Clause rather than on the Commerce Clause has never been adopted by this Court. Indeed, in *Carter & Weekes* itself the Court made it plain that its decision rested on the interstate aspects as well as the foreign commerce aspects of the transactions involved (330 U.S. at 425).

In later cases *Carter* has always been described as involving interstate commerce. In *Mich.-Wis Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 167, Carter was referred to as condemning a tax on "the loading of an interstate carrier." And a few years later, in *Alaska* v. *Arctic Maid,* 366 U.S. 199, at 202, *Carter* was described as dealing with a tax "on an integral part of an interstate movement."

More recently, in *United Air Lines* v. *Mahin,* 410 U.S. 623, Justice Douglas, who had written the opinion in *Canton,* dissented, citing both *Pudget Sound* and *Carter* with approval at page 635 as dealing with shipments "of goods by rail or water interstate."

We believe it to be important to the transportation industry that *Canton* be confined to its particular facts. In the record of that case the railroad company listed a series of sample transactions (pp. 23-26). We annex copies of the eight import items there described. It will be immediately apparent that the situation there was quite unlike the situation in the case at bar. Here, as respondent conceded in its answer (A. 11), the carriage of freight by appellant "was a segment or portion of shipments of such freight originating outside the State of New York * * *." And the undisputed testimony makes it clear that this was uninterrupted continuous transportation (A. 16, 17).

But in *Canton* many of the items involved services that were entirely separate from any transportation. In Import Item 2(a), the tax was on receipts from hauling merchandise which had come to rest. In 2(b) it was on wharfage; in 3, on storage; in the first parts of Items 4, 5, and 6, on the use of a crane. In Item 7, the charge was for wharfage; in Item 8, for weighing cars. All these activities were purely local. And in *Canton,* the railroad made no attempt to segregate the receipts which, like those here involved, were for part of the transportation, as, for instance, the switching in Items 1, 2(c), and 2(d).

Significant also is the difference in the manner of payment. In most of the instances listed in *Canton,* payments were made by a private concern, thus stressing the local character of the transaction. In the case at bar all the payments were part of through freight rates determined by tariffs filed with the Interstate Commerce Commission (A. 16, 19, 20).

It should be kept in mind, moreover, that the main thrust of the railroad's argument in *Canton* rested on the Import-Export Clause. The Commerce Clause argument was briefly disposed of by reliance on the "apportionment" doctrine (340 U.S. at 515). That was appropriate when dealing with a tax on receipts of all kinds, as was the case in *Canton.* There the taxing authority lumped all the items together and the railroad, in its challenge, made no attempt to separate those properly taxable because wholly local from those not taxable because part of interstate transportation. Here there was no such indiscriminate lumping either by the taxing authority or the railroad. The taxing authority listed seven separate items (A. 3). Appellant challenged only the first two of those (A. 4) and the second is out of the case because the state courts agreed with our contention that receipts from stevedoring were not taxable (A. 25, 26). Therefore the "apportionment" doctrine is not appropriate when, as here, we are dealing with a tax on receipts from continuous transportation. The stevedoring cases teach that a tax on "part" of interstate transportation cannot be upheld even though all the activities occurred within the taxing authority. So here, a tax on the transportation itself should not be upheld, even though the portion of the movement performed by appallant was entirely within the City.

The Appellate Division cited several other cases in addition to *Canton* (50 A.D.2d 540; A. 26). We submit they do not touch on the problem here presented.

Central Greyhound Lines v. *Mealey,* 334 U.S. 653, is not at all applicable here since there the transportation was from one point to another in New York, incidentally passing through other states. There was no question of taxing receipts from transportation that originated outside the state. In *Spector Motor Service* v. *O'Connor,* 340 U.S. 602,

Greyhound was described as a case involving purely local activities "such as the transportation of passengers between points within the same state, although including interstate travel" (p. 610).

Standard Steel Co. v. *Washington Revenue Department,* 419 U.S. 560, has no bearing on our problem at all. There, what was taxed were isolated services rendered within the state in connection with interestate sales. Here, what is being taxed are receipts from a continuous transportation from outside the state.

The tax here is not justified by any of the authorities relied on by the state courts and is directly contrary to this Court's holdings in the stevedoring cases. We submit that to permit such a tax will constitute a burden on interstate commerce since any railroad subject to it would try to get an increase in the freight charge to compensate for the tax.

CONCLUSION

We believe the issue is substantial so that a full presentation of the case on briefs and oral argument is called for.

Respectfully submitted,

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OSMOND K. FRAENKEL
ELIAS MESSING
Of Counsel

EXTRACTS

from

RECORD

in

CANTON R. R.

v.

ROGAN,

340 U.S. 511

Import No. 1

(23) In July of 1946, 1481 bales of woodpulp, weight 633,412 pounds consigned by Borregaard & Company, importers to E. I. DuPont DeNemours & Company, Richmond Virginia were shipped from Sweden aboard the S. S. Kanangoora.

On July 9, 1946 the S. S. Kanangoora docked at a pier of Canton at Baltimore, Maryland, where the ship was unloaded by stevedores into railroad freight cars. Canton allowed the consignee fifteen days free storage.

Pursuant to shipping instructions from William H. Mason, agent of Borregaard & Company, received by Canton on July 12, 1946, Canton transported the 1481 bales or 633,412 pounds of woodpulp to E. I. DuPont DeNemours & Company, as follows:

Destination	*Date Shipped (1946)*	*No. Bales*	*Weight*
Amphthill Siding, Richmond, Va.	7/12	164	70,142
Allegheny Warehouse A, Richmond, Va.	7/12	188	80,406
Allegheny Warehouse A, Richmond, Va.	7/12	188	80,406
Allegheny Warehouse A, Richmond, Va.	7/12	188	80,406
Allegheny Warehouse A, Richmond, Va.	7/13	188	80,406
Allegheny Warehouse A, Richmond, Va.	7/15	189	80,834
Allegheny Warehouse A, Richmond, Va.	7/15	188	80,406
Allegheny Warehouse A, Richmond, Va.	7/15	188	80,406
		1,481	633,412

[fol. 58] Canton on said dates switched the above cars to its connection in Baltimore with the line of the Pennsylvania Railroad, for which Canton made a charge of 37¢ per net ton, the charge being paid to Canton by the Pennsylvania Railroad Co. Canton received its payment from the Pennsylvania Railroad on the basis of a monthly statement of account submitted by Canton to the Pennsylvania Railroad.

(24) Canton's gross receipts for its said services in forwarding the said import of woodpulp were $117.18 (37¢ per net ton x 633,412 lbs.) for switching.

• • •

Import No. 2

In March of 1946, 31,000 one-hundred pound bags of sugar, consigned to various companies in the United States by Golodetz and Company of New York, were shipped from Cuba aboard the S. S. Corinto via the Canton Docks in Baltimore, Maryland. The shipment arrived at Canton's Pier No. 4 in Baltimore on March 19, 1946 and was forwarded by Canton according to instructions received from Golodetz and Company or its representatives.

Typical of the handling by Canton of the said shipments are the following dispositions:

(a) On March 20, 1946, Canton received hauling order No. 3360 from the Stickwell Sales Company, Baltimore, which made the sale for Golodetz & Company, directing Canton to deliver 170 bags of said sugar to the purchaser thereof, Wm. J. B. Shanks Company, Baltimore, delivery to be taken by the buyer's truck at Canton's Pier No. 4. Pursuant to this order, Canton, on March 20, 1946, delivered to the buyer's truck, license Md. 231-303, 170 bags of said sugar.

In connection with this delivery Canton furnished top wharfage for which service it made a charge of 2¾¢ per 100 pounds or $4.70 (2¾¢ per 100 lbs. x 17,085 lbs.) A bill [fol. 59] for this amount was submitted by Canton on March 27, 1946 to Golodetz & Company and paid shortly thereafter.

(b) On March 20, 1946, Canton received hauling order No. 3679 from the Stickwell Sales Company, Baltimore, which made the sale for Golodetz & Company, directing Canton to deliver 300 bags of sugar to the purchaser thereof, Seven-Up Company, Washington, D. C., delivery to be taken by the buyer's truck at Canton's Pier No. 4. Pursuant to this order Canton shortly thereafter, delivered to buyer's truck, license D. C.-D.T.-193, 300 bags of said sugar. In connection with this delivery Canton furnished top wharfage and for such service billed Golodetz & Company for the amount of $8.29 (2¾¢ per 100 lbs. x 30,150 lbs.) on March 27, 1946, which was paid shortly thereafter.

(25) (c) On March 28, 1946, Canton received shipping instructions from William H. Masson, agent of Golodetz & Company directing Canton to ship 1180 bags of said sugar to Geeman Bakeries, Cleveland, Ohio. Canton forwarded the same on March 29, 1946, via CRR-PRR on car NYC No. 161067. For its switching services Canton imposed a charge of 33¢ a net ton or $19.57 (118,590 lbs. x 33¢ a net ton) which was paid by the Pensylvania Railroad Co.

(d) On March 25, 1946, Canton received shipping instructions from William H. Masson, agent of Golodetz & Company, directing Canton to ship 1000 bags of said sugar to the Hershey Chocolate Corporation, Hershey, Pennsylvania. Canton forwarded the same on March 29, 1946, via CRR-PRR-Reading on car Milw. No. 715048. For its switching services Canton imposed a charge of 33¢ a net ton or $16.58 (100,500 lbs. x 33¢ per net ton) which was paid by The Pennsylvania Railroad Company.

• • •

[fol. 60] Import No. 3

In connection with the said shipment of sugar from Cuba to the United States via Canton, Baltimore, Maryland, which was unloaded at Canton Docks by the S. S. Corinto and consigned by Golodetz & Company to various companies in the United States, Canton allowed Golodetz & Company, consignor, 5 days free storage. At the expiration of 5 days all remaining sugar was subject to a storage charge of 5½¢ per 100 lbs. per month.

325,643 pounds or 3,292 bags of sugar, along with 2,292 pounds of sweepings, were left in the custody of Canton in excess of the five-day period awaiting forwarding instructions as hereinbefore described. For the storage of this sugar Canton imposed a charge of $180.36 at the above rate. Canton billed Golodetz & Company in this amount on March 30, 1946, and received payment shortly thereafter.

• • •

Import No. 4

In August of 1946, 12,006,520 pounds of Russsian chrome ore, consigned by the R. F. C. Office of Metals Reserve to the Treasury Department, Procurement Division, Seneca Ordinance Depot, Kendaia, New York, were shipped from (26) Russia aboard the S. S. Kamenetz Podolsk. On August 24, 1946, the S. S. Kamenetz Podolsk docked at the pier of the Canton Railroad Company. Pursuant to directions from the traffic manager of R. F. C. Office of Metals Reserve, The Cottman Company unloaded the ship by means of a crane. The crane used was the property of the Canton Railroad Company but was operated by The Cottman Company, the latter paying the former 7½¢ a long ton for all goods unloaded by means of the crane.

3,892,320 pounds were unloaded by means of the crane; the residue was unloaded by other means not furnished by Canton. Canton's receipts for crane privileges were [fol. 61] $130.32 (7½¢ per long ton x 3,892,320 lbs.). Canton also furnished switching services in connection with this shipment. A total of 99 carloads of ore were switched at the rate of 37¢ a net ton or $2,221.21 (37¢ net ton x 12,006,520 lbs.).

According to directions from the traffic manager of R. F. C. Office of Metals Reserve, these cars were shipped out by Canton between August 24 and August 28, 1946, to the Treasury Department, Procurement Division, Seneca Ordinance Depot, Kendaia, New York, via CRR, WMD, RDG, LV. Canton was paid for its switching by the Western Maryland Railroad Co.

• • •

Import No. 5

In July of 1946, 12,176,040 pounds of South African manganese ore, consigned by the Isthmian Steamship Company to the Carnegie Illinois Steel Corporation, Isabella Furnaces, Etna, Pennsylvania, were shipped from Durban, South Africa, aboard the S. S. Carrier Pigeon. On August 7, 1946, the S.S. Carrier Pigeon docked at Cottman's Crane Pier, Baltimore.

According to directions received from the Isthmian Steamship Company on August 2, 1946, the Cottman Company unloaded 7,.246,440 pounds of ore by means of a crane owned by Canton. The residue of the cargo, 4,929,600 pounds, was unloaded by other means not furnished by Canton. Canton received $242.63 (7½¢ per long ton x 7,246,440 pounds) for the use of its crane from the Cottman Company.

(27) The entire cargo of ore, 12,176,040 pounds was loaded into 87 cars and shipped out between August 7, 1946, and August 14, 1946, and consigned in bond by Canton to the Carnegie Illinois Steel Corporation, Isabella Furnaces, Etna, Pennsylvania, c/o Collector of Customs via CRR-PRR. Canton switched these 87 cars for which service it was paid by the Pennsylvania Railroad Co. 37¢ a net ton.

• • •

Import No. 6

[fol. 62] In August of 1946, 6,501,780 pounds of Indian manganese ore, consigned by the Bethlehem Steel Company to the Bethlehem Steel Company, Johnstown, Pennsylvania, were shipped from Vizagapata, India, aboard the S. S. Malancha. On August 25, 1946, the S. S. Malancha docked at the Canton terminals.

According to instructions from the F. H. Shallus Company, Baltimore, forwarding agents, the ship was unloaded by means of Canton's crane, operated by the Cottman Company and other means not furnished by Canton. 1,774,160 pounds of ore were unloaded by crane for which Canton received $59.40 (7½¢ per long ton x 1,774,160 pounds) from the Cottman Company.

The entire cargo of ore 6,501,780 pounds, was loaded into 54 cars and shipped out between August 25, 1946 and August 29, 1946, forwarded, pursuant to instructions, to the Bethlehem Steel Company, Johnstown, Pennsylvania, and routed via CRR-B&O-C&BL. Canton switched these 54 cars for which service it was paid by the B&O 37¢ a net ton.

• • •

Import No. 7

In January of 1946, the S. S. Joseph W. Hallister sailed from Europe with a cargo of 3,393,600 pounds of sand ballast consigned to the U. S. War Shipping Administration. This ship docked at Canton's pier and was unloaded on January 19, 1946 pursuant to directions from the U. S. War Shipping Administration. The unloading was done by means of a crane owned by Canton and operated by the Cottman Company. The sand was placed directly into lighters, and thus Canton furnished no other service in connection with this shipment. However Canton did not (28) impose its usual charge of 6½¢ per net ton unloaded for the privilege of side wharfage.

On February 28, 1946 Canton billed the U. S. War Shipping Administration in the amount of $110.31 (6½¢ per [fol. 63] net ton or fraction thereof x 3,393,600 pounds) for the side wharfage facilities furnished.

• • •

Import No. 8

Between February 11 and February 14, 1946, the S. S. Llandaff discharged at a pier of the Canton Railroad Company 67 carloads of Brazilian metallurgical grade manganese ore, shipped from Brazil, and consigned to the R. F. C. Office of Metals Reserve. These cars were switched by Canton to Canton's storage facilities, there unloaded and the ore stored.

Of the 67 cars filled with the cargo of ore, 5 carloads were composed of ore which could not be unloaded by means of a crane and thus could not be weighed by the crane scale as is the usual procedure. This fact necessitated a later weighing by Canton of these 5 cars, which service Canton furnished at the rate of 10¢ a gross ton weighed.

For weighing these cars, Canton billed the R. F. C. Office of Metals Reserve in the amount of $31.65 (10¢ per gross ton x 316.48 gross tons) on February 28, 1946.

• • •

Export No. 1

On August 1, 1946, the Carnegie Illinois Steel Corporation, Irvin Works, Irvin, Pennsylvania, shipped on the Pennsylvania Railroad Co. on car PRR No. 840399 under waybill No. 914251 from Pittsburgh, 33 metal packages or 2,451 sheets of black sheet steel to the Canton Docks, Baltimore, Maryland, consigned to the United States Steel Export Company, Baltimore, for export to South Africa, the original way bill being so endorsed. Upon arrival of the car at Baltimore, Canton performed its customary forwarding switching services from its connection with the line of The Pennsylvania Railroad in Baltimore to Canton's [fol. 64] pier and charged for this service at the rate of 37¢ a net ton or $23.12 (37¢ a net ton x 125,035 lbs.) which charge was paid to Canton by The Pennsylvania Railroad

(A 26)

Memorandum of Appellate Division

STEVENS, *P.J.*,
MARKEWICH, KUPFERMAN, MURPHY, LUPIANO, *JJ.*
1304

In re Application of

NEW YORK DOCK RAILWAY,

Petitioner,
O. K. FRAENKEL

to Review the Determination of the
DIRECTOR OF FINANCE OF THE CITY OF NEW YORK,

Respondent,
S. J. WARMS

with respect to an alleged Utility Tax Deficiency.

Determination of respondent Director of Finance of the City of New York, dated October 30, 1974, taxing petitioner's receipts for transportation services ("lighterage") and for loading and unloading ships ("stevedoring") unanimously modified, on the law, to the extent of annulling the tax imposed on the stevedoring operations and otherwise confirmed without costs or disbursements.

It appears, and respondent now concedes, that petitioner's stevedoring activities involved imports and exports and that taxation of receipts from those operations is beyond the power of the City. (*Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422.) However, we find no such immunity from the City's utility tax (Admin. Code, Title QQ, sec. 46-2.0) for petitioner's receipts from rail and water transportation services rendered entirely within the City. (*Cf. Canton R. Co.* v. *Rogan*, 340 U.S. 511; *Greyhound Lines* v. *Mealey*, 334 U.S. 653 and, on remand, *Central Greyhound Lines* v. *Mealey*, 298 N.Y. 876; *Standard Steel Co.* v. *Wash. Revenue Dept.*, 419 U.S. 560.)

Order filed.

Memorandum of Court of Appeals

No. 588

In the Matter of

NEW YORK DOCK RAILWAY,

Appellant,

vs.

DIRECTOR OF FINANCE OF THE CITY OF NEW YORK,

Respondent.

Judgment affirmed, with costs on the memorandum at the Appellate Division (50 A D 2d 540).

All concur.

Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

THE HON. CHARLES D. BREITEL, *Chief Judge*, Presiding

No. 588

In the Matter of

NEW YORK DOCK RAILWAY,

Appellant,

vs.

DIRECTOR OF FINANCE OF THE CITY OF NEW YORK,

Respondent.

The appellant in the above entitled appeal appeared by Hays, St. John, Abramson & Heilbron; the respondent appeared by W. Bernard Richland, Corporation Counsel.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs, on the memorandum at the Appellate Division (50 A D 2d 540). All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, December 22, 1976.

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Index No. 02161/75

In the Matter of the Application of

NEW YORK DOCK RAILWAY,

Petitioner,

to Review the Determination of the
DIRECTOR OF FINANCE OF THE CITY OF NEW YORK,

Respondent,

with respect to an alleged Utility Tax Deficiency.

PLEASE TAKE NOTICE that NEW YORK DOCK RAILWAY hereby appeals to the Supreme Court of the United States from the judgment of affirmance rendered herein by the New York Court of Appeals on or about December 22, 1976. Said appeal is taken pursuant to 28 U.S.C. 1257(2).

Dated: January 24, 1977

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To: COUNTY CLERK OF NEW YORK COUNTY
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This notice was filed on January 24, 1977 in the Office of the Clerk of the County of New York, which has possession of the record.

Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1201

In the Matter of the Application of

NEW YORK DOCK RAILWAY,

Appellant,

To Review the Determination of the Director of Finance of the City of New York,

Appellee.

with respect to an alleged Utility Tax Deficiency.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1201

In the Matter of the Application of

NEW YORK DOCK RAILWAY,

Appellant,

To Review the Determination of the Director of Finance of the City of New York,

Appellee,

with respect to an alleged Utility Tax Deficiency.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

I

Preliminary Statement

The Appellant has appealed from a Final Order and Judgment of the Court of Appeals

of the State of New York dated December 22, 1976, which affirmed an order of the Appellate Division of the Supreme Court of that State.

This Motion to Dismiss is made on the ground that the issue raised does not present a substantial Federal question.

The memorandum opinion of the Court of Appeals is officially reported in 40 NY 2d 1037. At the time of writing the opinion has not yet been published in the Northeastern reporter. It appears in part at page 18 of the Appellant's jurisdictional statement and more fully in a postfix to this text. The memorandum opinion of the Appellate Division is officially reported in 50 A.D. 2d 540 (1st Dept. 1975), 375 N.Y. Supp. 2d 328 (1975) and

its text is set forth at page 17 of that statement.

By this appeal Appellant challenges the constitutional validity of the New York City Utility Tax Law when applied to its receipts from its carriage of goods in interstate and foreign commerce which carriage takes place entirely within the boundaries of the City of New York. At issue is whether or not this Court's decision in Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947) was effectively overruled by this Court's later decisions in Greyhound Lines v. Mealey, 334 U.S. 653 (1948) and Canton R. Co. v. Rogan, 340 U.S. 511 (1951) and whether or not they became the controlling authorities.

II

Statute Involved

The provision of the New York City Utility Tax Law, Title QQ of Chapter 46 of the Administrative Code of the City of New York, relevant to this appeal is set forth at page 2 of appellant's Jurisdictional Statement.

III

Statement of the Case.

This proceeding was instituted under the provisions of Article 78 of the Civil Practice Law and Rules of the State of New York to review a final determination of the Appellee, which, based on certain of appellant's gross receipts, determined that there was due under the New York City Utility Tax Law the amount of $2,935.66 together with interest and/or

penalty of $1,374.11, a total of $4,309.77. The part of this tax which related to stevedoring receipts was eliminated by Appellee's consent to a reduction of the determination.

The determination under review was issued after a hearing held by Appellee, at which evidence was adduced and testimony given by Appellant and Appellee, both having appeared by counsel at that hearing.

Under New York Practice, the administrative hearing constitutes a trial of the issues in the case (Art. 78, New York Civil Practice Law and Rules). The determination issued in this case after the hearing was reviewed by the Supreme Court of the State of New York, Appellate Division, First Department, which unanimously confirmed it. Upon appeal by the Appellant to the Court of Appeals of the

State of New York, that Court unanimously affirmed the order of the Appellate Division.

VI

Facts

Appellant operates a railroad located entirely within the City of New York with ancillary car-float service. During the period January 1, 1969 to December 31, 1970 it had receipts of $64,544.50 from operations, erroneously called "lighterage operations", receipts from stevedoring operations, which were eliminated from the issues, and miscellaneous receipts from other operations which also are not in issue. The receipts denominated as "lighterage" were received for transportation wholly within the City of New York. The taxpayer's services here consisted of floating railroad cars from the terminals

of interstate railroads within the City of New York across waters wholly within the City to its rail terminals and moving those cars over its tracks wholly within the City to consignees located along those tracks.

Appellant also engaged in stevedoring operations on ships bound for and coming from foreign countries at piers in Brooklyn. Because the receipts from stevedoring activities may have raised questions under the Import-Export clause of the Constitution, the Appellee consented to an appropriate modification of his determination, with the result that these receipts are not in issue. Similarly Appellant did not contest the inclusion of other receipts in the Appellee's determination, receipts from various local activities.

V

Argument

A TAX ON RECEIPTS FROM TRANSPORTATION OF GOODS WHOLLY WITHIN THE CITY OF NEW YORK WHERE THE TRANSPORTATION IS A LOCAL SEGMENT OF AN INTERSTATE SHIPMENT, DOES NOT CONSTITUTE AN IMPROPER BURDEN ON INTERSTATE COMMERCE.

The Appellee believes that the cases of Greyhound Lines v. Mealey, 334 U.S. 653 (1948) and Canton R. Co. v. Rogan, 340 U.S. 511 (1951) resulted in the sub silentio overruling by this Court of its earlier holdings in Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947) and Puget Sound Co. v. Tax Commission, 302 U.S. 90 (1937) on which cases the Appellant relies. Also overruled by these later cases, was Galveston, Harrisburg &c Ry. Co. v. Texas, 210 U.S. 217 (1908) which, despite

its factual resemblance to the instant case, Appellant does not cite.

The City of New York brought the Carter & Weekes case to this Court on the heels of a relatively new approach to tax cases involving the commerce clause. At that time it felt that the cases of Western Live Stock v. Bureau, 303 U.S. 250 (1938), McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), Gwin, etc., Inc. v. Henneford, 305 U.S. 434 (1939) and others, cleared the way via the multiple tax burdens doctrine, for a new approach to the stevedoring cases. Chief Justice Stone throughout the development of the multiple tax burdens doctrine led the way to a more realistic approach to balancing the protection of interstate

commerce and the needs of the taxing states and jurisdiction.

However, as we know, this Court in the Carter & Weekes case adhered to the earlier Puget Sound case in a 5-4 decision. The decision was unexpected. See Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harvard Law Rev. 40 (1943) and Powell, New Light on Gross Receipts Taxes, 53 Harvard Law Rev. 909 (1940). The Carter & Weekes decision was the subject of extensive adverse criticism by authorities in the field of interstate commerce. See Hartman, State Taxation of Interstate Commerce (1953) at pp. 204, 205 and 206; Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev., 501 & 710, at pp. 743-746 (1947).

In the Carter & Weekes case Mr. Justice Douglas wrote a strong partial dissent (330 U.S. p. 434-435). In this dissent Justice Douglas reflected the arguments of the City with respect to the interstate commerce involved but felt strongly that the stevedoring of imports and exports violated Article I, §1 cl. 2 of the Constitution (id., pp. 444-445) which he felt was written "in terms which admit no exception but the single one which it contains". (id., p. 445). A little over a year later this Court decided Greyhound Lines v. Mealey, 334 U.S. 653 (1948). The Greyhound Lines case squarely supports the present tax as constitutional especially when it is read together with the decision of the New York Court of Appeals on remand. See Central Greyhound Lines v. Mealey, 298 N.Y. 876, 84 N.E. 2d 801 (1949). The Greyhound

Lines case involved a gross receipts tax apportioned on the basis of mileage within the state to the total mileage of the interstate journey.

Some four years after the decision in the Greyhound Lines case, came Canton R. Co. v. Rogan, 340 U.S. 511 (1951), a case factually indistinguishable from the case at bar. We think it significant that the opinion of the Court was written by Mr. Justice Douglas (Chief Justice Vinson did not participate in the decision; Justice Jackson and Justice Frankfurter reserved decision). When read in the light of his dissent in the Carter & Weekes case, it becomes clear that the Court in the Canton case did discard the rationale of the Carter & Weekes case. The Canton case involved both the import-export clause and

the commerce clause of the Constitution. The railroad company operated a railroad line connecting marine terminals with the lines of major trunk railroads. The railroad contested the imposition of a Maryland gross receipts tax apportioned to the mileage of its railroad lines within the State as violative of both the commerce and import-export clauses. The apportionment resulted in a tax on all its receipts since the lines of the railroad were confined to Maryland. This Court held that the railroad was not protected against the tax by the import-export clause of the constitution because importing and exporting "begin and end at water's edge" (340 U.S. at p. 515) thus distinguishing it from the protection which Justice Douglas thought was extended to the foreign commerce activities

in the Carter & Weekes Case.*

The tax at bar is imposed by a law, the structure and language of which have been construed as calling for apportionment of interstate transportation receipts by mileage. Central Greyhound Lines v. Mealey, 298 N.Y. 876; 84 N.E. 2d 801 (1949). Indeed, Mr. Justice Douglas in the Canton R. case cited this Court's decision in Central Greyhound Lines as authority for the validity of a tax on transportation apportioned by mileage. Like the Maryland tax involved in Canton R. Co. the New York City Utility Tax is apportioned precisely in the ratio that taxpayer's New York City

*The Canton Railroad case and its companion, Western Maryland R. Co. v. Rogan, 340 U.S. 520 (1951), even cast some doubt on the foreign commerce holding of Carter & Weekes (340 U.S. at pp. 515 and 522), treating that as "a question we reserve" (ibid).

mileage bears to its total milegage, i.e., 100%.

The rationale of the Carter & Weekes decision was that a state could not impose a tax directly on interstate commerce itself even though the tax posed no threat of multiple tax burdens. Both Greyhound Lines and Canton sustained taxes levied directly on just such interstate transportation, the carrying of passengers in interstate commerece and the switching of cars (from railhead to railhead, Canton, Applt's br. pp 6 & 7) which switching yielded approximately $500,000 in receipts out of total receipts of about $700,000 [Canton Rec. p. 1(a)]. Appellant would believe that Canton involved only the import-export clause and secondarily the commerce clause, but a quotation from the

opinion reveals that (340 U.S. at p. 515):

> "[t]he objection to Maryland's tax on the ground that interstate commerce is involved is not well taken."

Although Appellant in its Jurisdictional Statement indicates that the citation by the Appellate Division, on whose memorandum the Court of Appeals affirmed (Applts. Juris. Statement pp. 8, 17 & 18), of Standard Steel Co. v. Washington Revenue Dept., 419 U.S. 560 (1975) was not appropriate, we believe the New York Court cited it for the same reason for which we cite it, namely as a recent example of the application of the multiple tax burdens doctrine which was the basis for Greyhound Lines and Canton R. Co.

Conclusion

The appeal from the Order and Judgment of the Court of Appeals of the State of New York should be dismissed.

Respectfully submitted,

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MEMORANDUM OPINION OF N.Y. COURT OF APPEALS

In the Matter of NEW YORK DOCK RAILWAY, Appellant, v. DIRECTOR OF FINANCE OF THE CITY OF NEW YORK, Respondent.

APPEAL, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 18, 1975, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court at Special Term, entered in New York County), unanimoulsy modified, on the law, and, as modified, confirmed a determination of respondent taxing petitioner's receipts for transportation services ("lighterage") and for loading and unloading ships ("stevedoring"). The modification consisted of annulling the tax imposed on the stevedoring operations. Petitioner operated a railroad located entirely within the

City of New York. The Appellate Division stated that petitioner's stevedoring activities involved exports and imports and that taxation of those operations was beyond the power of the city; but that there was no such immunity from the city's utility tax for petitioner's receipts from rail and water transportation services rendered entirely within the city. In the Court of Appeals petitioner argued that the Utility Tax Law of the City of New York (Administrative Code of the City of New York, § QQ46-2.0) was unconstitutional as applied to gross receipts from interstate and foreign commerce.

Osmond K. Fraenkel and Elias Messing for appellant.

W. Bernard Richland, Corporation Counsel (Samuel J. Warms of counsel), for respondent.

Judgment affirmed, with costs, on the memorandum at the Appellate Division (50 AD2d 540).

Concur: Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE.